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| APPLICATION NO. | FILING DATE | FIRST NAMED INVENTOR | ATTORNEY DOCKET NO. | CONFIRMATION NO. |
|--|-------------|----------------------|---------------------|------------------|
| 10/668,537 | 09/23/2003 | Don Warburton | 14374.106 | 2130 |
| 66358 7590 07/24/2008 WORKMAN NYDEGGER (Varian) 60 E. SOUTH TEMPLE SUITE 1000 SALT LAKE CITY, UT 84111 | | | | |
| EXAMINER | | | | |
| AUSTIN, AARON | | | | |
| ART UNIT | | PAPER NUMBER | | |
| 1794 | | | | |
| MAIL DATE | | DELIVERY MODE | | |
| 07/24/2008 | | PAPER | | |

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**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Application Number: 10/668,537
Filing Date: September 23, 2003
Appellant(s): WARBURTON, DON

Peter F. Malen Jr.
For Appellant

SUPPLEMENTAL EXAMINER'S ANSWER

This is in response to the Panel Remand of 5/28/08 and Reply Brief filed 5/7/07
appealing from the Office action mailed March 13, 2006.

Responsive to the remand under 37 CFR 41.50(a)(1) for reasons other than for further consideration of a rejection on 5/28/08, a supplemental Examiner's Answer is set forth below responding to the new arguments of the Reply Brief of 5/7/07 as directed by the remand:

II. Response to Arguments in the Reply Brief of 5/7/07

Issue 1:

Regarding the rejection of claims 1-36 under 35 USC 112, first Paragraph, the claims are rejected as failing to comply with the enablement requirement. More particularly, the rejection states that the claimed inorganically bonded ceramics are insufficiently described in the specification such that one of ordinary skill in the art would understand which of the many known inorganic ceramics may be implemented to form the claimed emissive coating. The only examples in the specification of the claimed coating materials are noted using the trademarks/trade names HIPERCOAT®, "HPC/H02" and "HPC/H05" (paragraphs [0054]-[0055]), for which the generic composition was not provided. Without knowledge of the compositions represented by the trademarks/trade names, one of ordinary skill in the art is not provided with sufficient information to practice the invention as trademarks/trade names may represent any number of individual products over time having any number of physical properties. Therefore, undue experimentation is necessary to determine which of the many known inorganic ceramic coatings are suitable in forming the claimed emissive coating for use as the taught x-ray device component.

In response, appellant has presented several arguments attempting to establish that this rejection lacks merit.

(1) Appellant first argues that the Examiner has failed to properly apply the established legal standard.

In support of this argument, appellant contends the examination has not taken into account the numerous factors to be considered when determining whether a disclosure is sufficiently enabling of the claimed invention. In particular, it is argued that the prior rejections do not address the matter of undue experimentation fully and instead focused on one factor alone and therefore the rejection neglected the required analysis.

However, the numerous factors associated with undue experimentation provided by *In re Wands* have been taken into account (see below) and in weighing the factors the specification was found to be insufficient, particularly with respect to Factors (A), (B), (F), (G), and (H) as described in MPEP 2164.01(a)). Thus, as outlined below, the determination of which inorganically bonded ceramics may function as the claimed emissive coatings requires undue experimentation. Referring to the one example provided by appellant in defining suitable ceramics, as trademarks/trade names are not representative of a particular composition as they may be applied to any number of individual products over time having any number of physical properties, one of ordinary skill in the art is not provided with sufficient information to determine the working composition of the claimed emissive coating.

There are many factors to be considered when determining whether there is sufficient evidence to support a determination that a disclosure does not satisfy the

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enablement requirement and whether any necessary experimentation is "undue." These factors include, but are not limited to:

- (A) The breadth of the claims;
- (B) The nature of the invention;
- (C) The state of the prior art;
- (D) The level of one of ordinary skill;
- (E) The level of predictability in the art;
- (F) The amount of direction provided by the inventor;
- (G) The existence of working examples; and
- (H) The quantity of experimentation needed to make or use the invention based on the content of the disclosure.

In re Wands, 858 F.2d 731, 737, 8 USPQ2d 1400, 1404 (Fed. Cir. 1988)

(reversing the PTO's determination that claims directed to methods for detection of hepatitis B surface antigens did not satisfy the enablement requirement). In *Wands*, the court noted that there was no disagreement as to the facts, but merely a disagreement as to the interpretation of the data and the conclusion to be made from the facts. *In re Wands*, 858 F.2d at 736-40, 8 USPQ2d at 1403-07. The Court held that the specification was enabling with respect to the claims at issue and found that "there was considerable direction and guidance" in the specification; there was "a high level of skill in the art at the time the application was filed;" and "all of the methods needed to practice the invention were well known." 858 F.2d at 740, 8 USPQ2d at 1406. After considering all the factors related to the enablement issue, the court concluded that "it would not require undue experimentation to obtain antibodies needed to practice the claimed invention." *Id.*, 8 USPQ2d at 1407.

The factors described above have been considered as follows:

(A) The breadth of the claims: As noted in the Non-Final rejection of 2/4/05 on page 3, the claimed emissive coating which substantially comprises an inorganically bonded ceramic is not sufficiently described in the specification to enable one skilled in the art to make and use the invention. More particularly, it was pointed out that "it is very confusing as to what type of inorganically bonded ceramics qualify as the claimed emissive coating since the specification does not provide sufficient description". It was concluded that "it appears that any type of inorganically ceramic whether the emissivity is high or low can function as the claimed emissive coating". As such, the claim is extremely broad.

(B) The nature of the invention: As noted in the Non-Final rejection of 2/4/05 on page 3, the nature of the invention is unclear. More particularly, it was pointed out that "it is very confusing as to what type of inorganically bonded ceramics qualify as the claimed emissive coating since the specification does not provide sufficient description".

(F) The amount of direction provided by the inventor: As noted in the Non-Final rejection of 2/4/05 on page 3, the only example of the coating material is referred to trade names on paragraphs [0054]-[0055]. There is no other guidance provided for defining which of the many known ceramics display the claimed emissive properties. As such, one of ordinary skill in the art is not provided a starting point from which to determine which inorganic ceramic compositions fall within the scope of the claims.

(G) The existence of working examples: As noted in the Non-Final rejection of 2/4/05 on page 3, the only example of the coating material is referred to trade names on paragraphs [0054]-[0055]. As this example fails to define the chemical composition of the coating materials and instead only identifies the materials used in the example by trade names assignable to any number of products, one of ordinary skill in the art is not provided sufficient information to determine the limitations and/or teachings of the only example provided.

(H) The quantity of experimentation needed to make or use the invention based on the content of the disclosure: As noted in the Non-Final rejection of 2/4/05 on page 3, the claimed emissive coating which substantially comprises an inorganically bonded ceramic is not sufficiently described in the specification to enable one skilled in the art to make and use the invention. Further, as noted in the Final rejection of 8/19/05 at page 5, the Examiner attempted to exhaust all of the possible resources available to determine the generic composition provided for in the one example in the present specification. As neither Appellant nor any of the resources provided disclosure of suitable emissive ceramics or the composition of the coating materials provided for in the lone example found in the specification, namely the use of ceramics under the trade names HIPERCOAT®, "HPC/H02" and "HPC/H05", there is insufficient information available for one of ordinary skill in the art to make or use the invention based upon the content of the disclosure.

Thus, contrary to appellant's assertion, numerous factors under *In re Wands* have been established on the record prior to Appeal. More particularly, analysis of factors (A), (B), (F), (G), and (H) as set forth above establish there is insufficient information of record for one of ordinary skill in the art to make the claimed invention.

As noted by appellant in the Reply Brief of 5/7/07 on page 5, lines 1-8, MPEP 2164.04 does not require discussion of each factor (e.g., factors (C), (D), and (E)). That said, to clarify the importance of the remaining factors, factor (C) has been addressed in part (2) below. Further, the level of ordinary skill in the art, factor (D), is not such that one can determine which ceramics qualify as "emissive coatings" without further explanation provided by the appellant and/or undue experimentation. More particularly, as appellant has provided little guidance as to which ceramics have the claimed emissive properties, it is beyond the skill of one of ordinary skill in the art to determine the identity of suitable ceramics from the disclosure without undue experimentation. As for the level of predictability in the art, factor (E), there is no known method for determining which ceramics are "emissive" without undue experimentation. For these reasons factors (C), (D), and (E) do not outweigh the analysis of factors (A), (B), (F), (G), and (H) as set forth above.

In weighing the above stated factors, it is the Examiner's position that undue experimentation is required to determine which of the many available inorganically bonded ceramics can act as emissive coatings as claimed. Accordingly, even though the statute does not use the term "undue experimentation," it has been interpreted to require that the claimed invention be enabled so that any person skilled in the art can

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make and use the invention without undue experimentation. *In re Wands*, 858 F.2d at 737, 8 USPQ2d at 1404 (Fed. Cir. 1988). See also *United States v. Teletronics, Inc.*, 857 F.2d 778, 785, 8 USPQ2d 1217, 1223 (Fed. Cir. 1988) ("The test of enablement is whether one reasonably skilled in the art could make or use the invention from the disclosures in the patent coupled with information known in the art without undue experimentation."). It is therefore concluded that the scope of the claims are not enabled by appellant's disclosure.

With respect to the example provided in the specification that relies on trademarks/trade names for enablement, as noted in the Final rejection of 3/13/06 on page 4, MPEP 608.01 (v) [R-2] recognizes the relationship between a trademark and the product it identifies is sometimes indefinite, uncertain, and arbitrary. The formula or characteristics of the product may change from time to time and yet it may continue to be sold under the same trademark. In patent specifications, every element or ingredient of the product should be set forth in positive, exact, intelligible language, so that there will be no uncertainty as to what is meant. Arbitrary trademarks which are liable to mean different things at the pleasure of manufacturers do not constitute such language. *Ex Parte Kattwinkle*, 12 USPQ 11 (Bd.App. 1931). If a trademark or a tradename has no fixed and definite meaning which can be determined and it involves some physical or chemical characteristic of the invention, then identification by scientific or other explanatory language is necessary. *In re Gebauer-Fuelnegg*, 121 F.2d 505, 50 USPQ 125 (CCPA 1941). See MPEP 608.01(v).

In conclusion, the totality of the information provided in the present case does not provide sufficient information for one reasonably skilled in the art to make the claimed invention. The emissive coating is an essential element in the claimed component. The only examples of the coating material is referred to trade names on paragraphs [0054]-[0055], were the trademarks/trade names HIPERCOAT®, "HPC/H02" and "HPC/H05". Accordingly, identification of the appropriate emissive inorganically bonded ceramics such as the products identified in the specification by the trademarks or trade names is necessary to enable one skilled in the art to make and use the invention. The analysis of record and set forth above demonstrates application of the required legal standard in making this determination.

(2) Appellant's next argument attempts to establish that the state of the art, as defined by the Examiner, corresponds with a relative reduction in the required scope of appellant's disclosure.

In support of this argument, appellant takes the position that "the state of the prior art" (Factor (C) set forth above) in the present case is sufficiently advanced that the required scope of appellant's disclosure (Factor (F) set forth above) is correspondingly reduced as the two are inversely related per MPEP 2164.03.

In response, the state of the prior art (Factor (C)) has not been established at such a high level that appellant's disclosure (Factor (F)) is reduced sufficiently that the present specification becomes enabling. Appellant's contention that the Examiner's rejections establish such a great reduction in the requirement for disclosure is flawed.

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Nothing in the prior art of record or the specification provides to one of ordinary skill in the art with the knowledge of which inorganically bonded ceramics of the many known inorganic ceramics may be implemented to form the claimed emissive coatings. Therefore, the Examiner has concluded that determination of which inorganically bonded ceramics may be formed into the claimed emissive coating requires undue experimentation. As such, the breadth of the claims is not enabled.

(3) Appellant further argues with respect to this issue that the Examiner has incorrectly suggested there is a *per se* rule that the claimed composition be disclosed for the claims to be enabled.

In support of this argument, appellant points to the reply of February 21, 2006 at pages 8-9 and the specification at pages 8 and 17 as providing ample support and explanatory language to enable one of skill in the art to make and use the claimed invention.

In response, the listed properties provided by appellant to support this argument are not in the claims. As such, the claims themselves are broader than the restrictions on enablement proposed by these arguments. That is to say, the claims do not provide for the physical properties set forth in the reply of February 21, 2006 at pages 8-9 and the specification at pages 8 and 17 and as such are broad enough to include embodiments wherein the claimed ceramics do not have the taught properties.

Furthermore, the properties described are not sufficiently limiting to provide guidance to one of ordinary skill in the art as to which inorganically bonded ceramics will

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are suitable for use in forming the claimed emissive coating. In fact, a majority of the properties describe properties that may be associated with a large number of inorganic ceramic compositions. The specification has failed to provide support for each and every ceramic composition having the stated properties being suitable for use as an emissive coating as claimed.

Moreover, contrary to appellant's position a *per se* rule has not been argued. However, it has been argued that the list of properties provided fail to identify the coating materials suitable for use as the emissive coating. More particularly, the Final rejection of 3/13/06 at page 5 responds by reiterating that the present specification fails to provide sufficient information for one to make the claimed product outside of the one example that relies upon trademarks/trade names. As noted above, "The test of enablement is whether one reasonably skilled in the art could make or use the invention from the disclosures in the patent coupled with information known in the art without undue experimentation." *United States v. Telectronics, Inc.*, 857 F.2d 778, 785, 8 USPQ2d 1217, 1223 (Fed. Cir. 1988). It is the Examiner's position that one of ordinary skill in the art cannot arrive at a definitive list of ceramics having the properties discussed by appellant in addition to being "emissive" without undue experimentation. To put it more simply, undue experimentation is required of one of ordinary skill in the art to discover which inorganically bonded ceramics have all of the properties listed outside of the lone trademark/trade name examples provided in the specification. Therefore, the identification of the product(s) referred to under the trademark/trade

names is deemed necessary for enablement under the principles set forth according to MPEP 608.01 (v)[R-2].

(4) Appellant's final argument with respect to this issue is that the apparent suggestion of the Examiner that appellant is relying only on trademarks/trade names for enablement is incorrect.

In support of this argument, appellant argues the present application has not relied solely on trademark/trade names for enablement of the claims. As such, the argument states the Examiner has failed to give due consideration to the information provided in the disclosure concerning the claimed coating and has instead erroneously focused on the matter of whether or not specific chemical formulae have been disclosed.

In response, the arguments set forth throughout the record have established that the specification does not provide sufficient information for one of ordinary skill in the art to arrive at inorganically bonded ceramics suitable for forming the claimed emissive coating outside of the lone examples described using trademarks/trade names rather than compositions. As the claims do not confine the type of inorganically bonded ceramics suitable for use in the emissive coating, they are broader than enabled by the disclosure. Therefore, the identification of the product(s) referred to under the trademark/trade names is deemed necessary for enablement under the principles set forth according to MPEP 608.01 (v)[R-2].

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Issue 2:

Appellant's argument states the Examiner has failed to establish that McManus discloses the identical invention in as complete detail as is contained in the claims.

(1) With respect to claims 1-2, 4-15, and 17-19, appellant presents the new argument that McManus fails to disclose an "emissive" coating as claimed. Appellant furthers this argument by stating that inherency is not readily established. More particularly, appellant states the Examiner has provided neither rationale nor evidence showing inherency of the claimed "emissive" property in the cited reference.

In response, the present specification at paragraph [0008] defines the claimed emissivity as the attribute of emitting absorbed heat. Inorganic ceramics such as those taught by the cited references, as with all materials, absorb heat up to the heat of combustion and emit the same heat according to the laws of thermodynamics. As such, the inorganic ceramics in the cited references are considered to be "emissive" within the meaning of the claim as defined by the present specification. Further, as like materials to those taught by appellant, namely inorganic ceramics, are used in a like manner, they are expected to have the claimed emissive properties.

(2) With respect to claims 4 and 7, appellant presents the new argument that McManus fails to disclose a "dielectric" coating as claimed.

In response, a "dielectric" material is one such as a glass or porcelain with negligible electrical or thermal conductivity therefore useful as an insulator (see Onelook.com; Merriam-Webster's Online, Dictionary, 10th Edition; The American

Heritage Dictionary; etc.). A glazed ceramic used as an insulator such as taught by McManus (column 4, lines 1-3) is considered to fall within this definition of a dielectric. Further, as like materials to those taught by appellant, namely inorganic ceramics, are used in a like manner, they are expected to have the claimed dielectric properties.

(3) With respect to claims 7-10 and 18-19, appellant presents the new argument that McManus fails to disclose the claimed properties.

In response, as noted in the Non-final rejection of 2/4/05, the specification does not provide sufficient description of the specific inorganically bonded ceramic suitable for use as the claimed emissive coating (see the rejection under 35 USC 112 above). It appears that any type of inorganically bonded ceramic, whether the emissivity is high or low (present specification paragraph [0034]), can function as the claimed emissive coating. As like materials to those taught by appellant, namely inorganic ceramics, are used in a like manner as a coating, the ceramic coating disclosed by McManus is considered to be the same as the claimed emissive coating and have the same properties such as those recited in claims 7-10 and 18-19.

Or in the alternative, where the claimed parameters/properties may be expressed differently and thus may be distinct from what is disclosed in the prior art, it is incumbent upon applicants to establish that such difference is unobvious. Therefore, it would have been obvious to one having ordinary skill in the art at the time of the invention to employ the particular parameters as claimed, since it is well-established that merely selecting

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proportions and ranges is not patentable absent a showing of criticality. *In re Becket*, 33 USPQ 33, and *In re Russell*, 169 USPQ 426.

Furthermore with respect to the emissivity, as applicant has stated both high and low emissive materials are desirable (present specification paragraph [0034]), it would have been obvious to one having ordinary skill in the art at the time of the invention to adjust the claimed parameters for the intended application, since it has been held that discovering an optimum value of a result effective variable involves only routine skill in the art. *In re Boesch*, 617 F.2d 272, 205 USPQ 215 (CCPA 1980).

Issue 3:

Appellant's argument states the Examiner has failed to establish that Bliesner discloses the identical invention in as complete detail as is contained in the claims.

In particular, appellant presents the new argument that McManus fails to disclose an "emissive" coating as claimed. Appellant furthers this argument by stating that inherency is not readily established. More particularly, appellant states the Examiner has provided neither rationale nor evidence showing inherency of the claimed "emissive" property in the cited reference.

In response, the present specification at paragraph [0008] defines the claimed emissivity as the attribute of emitting absorbed heat. Inorganic ceramics such as those taught by the cited references, as with all materials, absorb heat up to the heat of combustion and emit the same heat according to the laws of thermodynamics. As such, the inorganic ceramics in the cited references are considered to be "emissive" within the

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meaning of the claim as defined by the present specification. Further, as like materials to those taught by appellant, namely inorganic ceramics, are used in a like manner, they are expected to have the claimed emissive properties.

Issue 4:

Appellant's argument states the Examiner has failed to establish a prima facie case of obviousness with respect to claims 1-2, 4-15, and 17-19 based upon McManus.

In support of this argument appellant restates the arguments presented with respect to Issue 2 above. The response as set forth above with respect to Issue 2 applies here as well.

Issue 5:

Appellant's argument states the Examiner has failed to establish a prima facie case of obviousness with respect to claims 1-2 and 4-10 based upon Bliesner.

In support of this argument appellant restates the arguments presented with respect to Issue 3 above. The response set forth above with respect to Issue 3 applies here as well.

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Issue 6:

Appellant's argument states the Examiner has failed to establish a prima facie case of obviousness with respect to claims 3, 16, and 20-26 based upon McManus and Tormey.

(1) In support of this argument, appellant restates the arguments set forth above with respect to the argument in Issue 2 that the references fail to teach the claimed "emissive" quality of the claimed coating. The response to this argument set forth above with respect to Issue 2 applies here as well.

(2) Further, appellant argues McManus and Tormey are non-analogous art and thus the motivation for combining the references, namely improved properties of reduced shrinkage and low firing temperature due to the addition of oxide fillers, is nonexistent. In response to applicant's argument that Tormey is nonanalogous art, it has been held that a prior art reference must either be in the field of applicant's endeavor or, if not, then be reasonably pertinent to the particular problem with which the applicant was concerned, in order to be relied upon as a basis for rejection of the claimed invention. See *In re Oetiker*, 977 F.2d 1443, 24 USPQ2d 1443 (Fed. Cir. 1992). In this case, as noted by appellant, Tormey teaches control of shrinkage and modification of the Thermal Coefficient of Expansion (TCE) (col. 5, lines 64-67). It is the Examiner's opinion that such control of size and TCE is desirable in the maintaining the size and shape of the ceramic of McManus which undergoes exposure to very high voltages (col. 5, lines 31-33) and thus high temperatures. Therefore, it would have been obvious to one of ordinary skill in the art to add oxide filler to the ceramic coating

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of McManus in order to improve the properties of the ceramic coating such as reduced shrinkage and TCE in addition to the benefits in cost of production due to a low firing temperature.

(3) Moreover, appellant argues the Examiner has not established that there is a likelihood that the combination would prove successful. However, as noted above, Tormey establishes the benefits of adding oxide filler to a ceramic. There is a reasonable expectation that the addition of oxide fillers to ceramics other than those taught by Tormey will result in these same benefits as like materials (ceramics) are used in a like manner (as protective coatings exposed to heat). Therefore it would be obvious to one of skill in the art to try the combination as outlined in the rejection with a reasonable expectation of success.

Issue 7:

Appellant's argument states the Examiner has failed to establish a prima facie case of obviousness with respect to claim 3 based upon Bliesner and Tormey.

(1) In support of this argument, appellant restates the arguments set forth above with respect to the argument in Issue 3 that the references fail to teach the claimed "emissive" quality of the claimed coating. The response to this argument set forth above with respect to Issue 3 applies here as well.

(2) Further, appellant argues Bliesner and Tormey are non-analogous art and thus the motivation for combining the references, namely improved properties of reduced shrinkage and low firing temperature due to the addition of oxide fillers, is

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nonexistent. In response to applicant's argument that Tormey is nonanalogous art, it has been held that a prior art reference must either be in the field of applicant's endeavor or, if not, then be reasonably pertinent to the particular problem with which the applicant was concerned, in order to be relied upon as a basis for rejection of the claimed invention. See *In re Oetiker*, 977 F.2d 1443, 24 USPQ2d 1443 (Fed. Cir. 1992). In this case, as noted by appellant, Tormey teaches control of shrinkage and modification of the Thermal Coefficient of Expansion (TCE) (col. 5, lines 64-67). It is the Examiner's opinion that such control of size and TCE is desirable in the maintaining the size and shape of the ceramic of Bliesner which undergoes thermal energy output during discharge. Therefore, it would have been obvious to one of ordinary skill in the art to add oxide filler to the ceramic coating of Bliesner in order to improve the properties of the ceramic coating such as reduced shrinkage and TCE in addition to the benefits in cost of production due to a low firing temperature.

(3) Moreover, appellant argues the Examiner has not established that there is a likelihood that the combination would prove successful. However, as noted above, Tormey establishes the benefits of adding oxide filler to a ceramic. There is a reasonable expectation that the addition of oxide fillers to ceramics other than those taught by Tormey will result in these same benefits as like materials (ceramics) are used in a like manner (as protective coatings exposed to heat). Therefore it would be obvious to one of skill in the art to try the combination as outlined in the rejection with a reasonable expectation of success.

III. Response to Arguments Regarding Form of Amended Brief of Appellant

Appellant's argument states the brief is not deficient with respect to claim 11 as the claimed inorganically bonded ceramic is the equivalent of the stated inorganically bonded composite (see Examiner's Answer at 2). Appellant points to paragraph [0053] for support of this contention. However, it is the Examiner's position that the Summary of Claimed subject matter is incorrect as a "composite" is not necessarily the equivalent of a "ceramic". As such, the use of the term "composite" provides a description of the claims that is broader than the actual claim language permits.

Appellant may file another reply brief in compliance with 37 CFR 41.41 within two months of the date of mailing of this supplemental examiner's answer. Extensions of time under 37 CFR 1.136(a) are not applicable to this two month time period. See 37 CFR 41.43(b)-(c).

/Aaron Austin/

A Technology Center Director or designee has approved this supplemental examiner's answer by signing below:

/Gregory L Mills/

Supervisory Patent Examiner, Art Unit 1700

Art Unit: 1700

Conferees:

/Rena L. Dye/

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